86-402

No. _____

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM 1986

BERLIN B. JOHNSON
PETITIONER

V.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS

I

Whether the Secretary's refusal to consider evidence previously submitted in Petitioner's claim constitutes actions that are arbitrary and capricious.

II

Whether the Secretary's failure to hold a fair hearing on all the evidence constitutes a violation of due process that should be accorded the Petitioner.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Berlin B. Johnson, and the respondent was Otis R. Bowen, Secretary of Health and Human Services.

The Respondent before this Court is Otis R. Bowen, Secretary of Health and Human Services.

Petitioner, Berlin B. Johnson, is an individual and as such has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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In The Supreme Court Of The United States

October Term 1986

BERLIN B. JOHNSON
Petitioner

V.

OTIS R. BOWEN,
Secretary of Health and Human Services
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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The petitioner, Berlin B. Johnson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered on April 30, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported, and is reprinted in the Appendix hereto, p. 1a, *infra.*

Likewise, the Order denying the Petition for Rehearing is also reprinted in the Appendix hereto,P. 4a, *infra.*

Finally, the Memorandum Opinion decision of the United States District Court for the Eastern District of Kentucky, Pikeville Division, (Unthank, D.J.) has not been reported. It is reprinted in the Appendix hereto, p.5a, *infra.*

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §405a (g), the petitioner brought this suit in the Eastern District of Kentucky. On March 29, 1985, the Eastern District denied the petitioner's Motion for Summary Judgment. See p. 5a, *infra.*

On petitioner's appeal, the Sixth Circuit on April 30, 1986, entered a judgment affirming the Eastern District's orders and directing the petitioner's Complaint be dismissed on the grounds that the Secretary's determination was supported by substantial evidence. See p. 1a, *infra.*

A Petition for Rehearing was filed, but the Sixth Circuit denied said petition on June 11, 1986. See p. 4a,*infra.*

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

42 U.S.C. §405(g) Judicial Review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within

any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for rehearing. The findings of the Secretary as to any fact if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after case is remanded, and after hearing such evidence if so ordered, modify or affirm his findings of fact or its decision, or both, and shall file with the court any additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified fin-

dings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as the judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner is a fifty-one (51) year old married man who resides with his wife and one (1) dependent child in an isolated and rural Eastern Kentucky community named Wayland, Kentucky.

Mr. Johnson's mental as well as physical impairments have prevented him from engaging in any substantial gainful activity since June 21, 1977.

From an intellectual standpoint, Mr. Johnson had an incomplete second grade education which limited him to being able to sign his name. Mr. Johnson can-

not read even the "stop" in a roadway sign (Transcript of Record, hereinafter "TR", p. 29). Moreover, Mr. Johnson's functional illiteracy is compounded by his mental retardation. Both a clinical psychologist as well as a psychiatrist who examined the Petitioner at the request of the Secretary found the Petitioner to have mild mental retardation, having an I. Q. of 60. (TR 60). Finally, even the Hearing Officer observed the petitioner to be of low intelligence at his formal hearing on February 15, 1984. (TR 11).

In spite of his mental limitations, Petitioner suceeded in becoming a productive member of society. For some twenty-three (23) years, Mr. Johnson labored as an underground coal miner in our nation's mines. This employment was forced to end on June 21, 1977 when the Petitioner's coal worker's pneumoconiosis had progressed to a point where it prevented Mr. Johnson from any sort of laboring. Coal Worker's Pneumoconiosis is a respiratory disease caused by prolonged exposure to coal dust and other noxious fumes found in coal mining. It is both progressive and irreversible in nature. See *Haywood v. Califano,* 699 F. 2d 277 (6th Cir. 1983).

After being forced to stop mining due to his respiratory condition, Petitioner filed for benefits under the Kentucky Workers' Compensation Act, and Federal Black Lung Act, 30 U.S.C. §901. Both programs have found that Mr. Johnson became totally and permanently disabled as the result of his coal worker's pneumoconiosis. Although the Petitioner recognizes that these adjudications of total and permanent disability were not binding on the Social Security Administration, said determinations should have been entitled to substantial weight before the

Secretary of Health and Human Services. *Kane v. Heckler*, 776 F. 2d 1130, 1135 (3rd Cir. 1985). Instead, they appear to have been ignored.

Petitioner filed two (2) prior applications for Social Security benefits which were denied. The current application for benefits was filed February 8, 1983. Mr. Johnson continued to argue that his disability commenced back in June 1977, but in light of the Secretary's unwillingness to revise or reopen those previous denials, he argued, in the alternative, that his disability became compensable under the Act between October 21, 1982 through December 31, 1982. In spite of uncontested medical evidence and testimony, the Secretary held that the Petitioner had no "severe" impairment and denied his claim.

Throughout this claim, Petitioner contends that the uncontradicted medical evidence demonstrates that his combined mental and physical impairments satisfy the severity requirements set forth in Listing 12.05 (c), of the Secretary's Listings of Impairments, 20 CFR §404.1520 (d) (referring to Impairments listed in 20 CFR part 404, Subpart P, Appendix 1).

Listing 12.05 (c) provides that if the Petitioner has an I.Q. of 60 to 69, and a physical or other mental impairment imposing additional and significant work related limitations of function, then the Secretary acknowledges that these impairments are so severe that they prevent a person from pursuing and gainful work. Petitioner notes that the mental impairment has been long-standing and that the respiratory impairment became apparent on June 21, 1977.

For these reasons, the Petitioner contends that the

Secretary's denials can only be viewed as arbitrary and capricious.

REASON FOR GRANTING THE WRIT

I

The Secretary's actions are so arbitrary and capricious as to be unsupported by substantial evidence

The Social Security Act has been with us since August 14, 1935. See Act of August 14, 1935, 49 Stat. 620. It affects nearly all of us. The system's administrative structure and procedures, with its essential determinations numbering into the millions, are of a size and extent difficult to comprehend. But as the Secretary argued in *Richardson v. Perales,* at its essence, "such a system must be fair - and it must work" 402 U. S. 389, 399 (1971).

Recognizing the enormous task before the Social Security Administration, Congress "conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Social Security Act" pursuant to 42 U. S. C. §405 (a). See *Schweiker v. Gray Panthers,* 453 U. S. 34 (1981); *Batterton v. Francis,* 432 U. S. 416, 425 (1977).

In 1978, the Secretary promulgated regulations implementing the definition of "disabled." See Fed Reg. 55349 (1978).

Those regulations recognize that certain impairments are so severe that they prevent a person from pursuing any gainful work. See 20 CFR

§404.1520 (d) (1982). A Claimant who establishes that he suffers from one of these impairments will be considered disabled without further inquiry. *Heckler v. Campbell,* 461 U. S. 458, 460 (1983).

The uncontradicted medical evidence supports the Petitioner's contention that his combined mental retardation along with his respiratory impairment meet Listing 12.05 (c) since June 21, 1977, or at the latest, October 21, 1982.

The Secretary's response, which has been affirmed by both lower courts, is that the Plaintiff's previous denials will not be reopened in spite of the unambiguous requirements posed by Listing 12.05 (c). Both lower courts have noted that reopening earlier determinations is within the Secretary's discretion and is not reviewable. See *Califano v. Sanders,* 430 U. S. 99, 109 (1977).

However, neither the Secretary nor the courts have explained how the Secretary's refusal to reopen prior determinations would justify the Secretry's refusal to evaluate proper medical evidence which was generated in a prior application in the Petitioner's current application, given the continuing relevance of that medical evidence.

When this issue was, in part, addressed by the Sixth Circuit in *Farris v. Secretary of Health and Human Services,* 773 F. 2d 85 (6th Cir. 1985), the majority of the Court acknowledged its importance.

The Petitioner recognizes that the scope of this review is very narrow, but also notes that given the fact that many other potential Claimants might be

placed in the same helpless situation by the Secretary's failure to abide by its own adopted regulations and mandates, that this court's defining the breath of the Secretary's shield of discretion would be a worthy issue for review.

II

The Secretary's Actions Have Deprived the Petitioner Due Process in His Administrative Proceeding

The application of due process to administrative procedings in not novel. *Hannah v. Larche,* 363 U. S. *420 (1960); Alaska Roughnecks and Drillers Association v. NLRB,* 555F. 2d 732, 735 (9th Cir. 1977), cert. denied, 434 U. S. 1069 (1978).

The Social Security Act provides that each Claimant has a right to a *de novo* hearing. 42 U. S. C. §405 (b) and due process under the Fifth Amendment. *Fleming v. Nestor,* 363 U. S. 603, 611 (1960).

In carrying out those dictates, the Secretary adopted 20 CFR §404. 927 which provides, in relevant parts:

> The hearing examiner shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters, ... the ... procedure at the hearing generally ... shall be at the discretion of the hearing examiner and of such nature as to afford the parties a reasonable oppor - tunity for a fair hearing. *Richardson v. Perales,* 402 U. S. 389 400 (1971).

As before, failure to abide by its own rules and regulations has allowed the Secretary to cause unjust discrimination to not only the Petitioner in this case

but also to the many Claimants who may or have filed their Social Security disability applications after a final earlier denial. For this reason, the need for some guidance is needed from this court to insure that the Social Security system remains working and continues being fair to those who seek benefits.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition should be granted.

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Appendix

Rendered April 30, 1986

Not Recommended for Full-Text Publication

No. 85-5484

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERLIN B. JOHNSON,
Plaintiff-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

BEFORE: Jones and Wellford, Circuit Judges; and Gilmore, District Judge.* Per Curiam. Appellant Berlin B. Johnson appeals from the denial of Social Security Disability benefits. Two previous applications had also been denied, the latter in a memorandum issued by an Administrative Law Judge on October 20, 1982. The prior denials had been appealed to the district court which affirmed in both cases; no further appeal was taken. Johnson last met the special earnings requirement of the Act on December 31, 1982.

Like the earlier applications, this third claim asserted that Johnson had become disabled in June

*Honorable Horace W. Gilmore, United States District Court for the Eastern District of Michigan, sitting by designation.

1977, the month he ceased working as a coal miner. After the claim was administratively denied, a hearing was held before an ALJ. The ALJ considered the prior denials of benefits as "establishing that the claimant was not disabled as of October 20, 1982". This was proper. While findings of fact made in a determination on one claim "may be revised in determining or deciding" a subsequent claim brought on the same earnings record, 20 C. F. R. § 404.995, the Secretary is not required to reopen an earlier determination and the decision not to do so is not reviewable by the court. See *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Because his eligibilty for benefits ended December 31, 1982, Johnson's burden was to show that he became disabled in the two-month period between October 20 and December 31, 1982. See *Gibson v. Secretary of H. H. S.*, 678 F.2d 653 (6th Cir. 1982). The ALJ's conclusion that Johnson had not met that burden must be affirmed if supported by substantial evidence. Id.

The records of five physicians were introduced, but all had examined or treated Johnson after December 1982; the earliest of these records was dated in July 1983. While these records would arguably support a finding that Johnson was disabled at the time of the hearing in 1984, none of the medical evidence relates back to the crucial period in 1982; nor did any of the physicians express an opinion of Johnson's condition during that period. Johnson himself stated at the hearing that his symptoms had worsened since 1982. In short, there was simply no evidence that could have supported a finding that Johnson was disabled between October 20 and December 31, 1982. The Secretary's determination that he was not disabled

must be upheld.

The judgment of the district court is AFFIRMED.

Rendered June 11, 1986
No. 85-5484
United States Court of Appeals
For the Sixth Circuit

BERLIN B. JOHNSON,
Plaintiff-Appellant

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant-Appellee

ORDER

BEFORE: Jones and Wellford, Circuit Judges; and Gilmore, District Judge.* Appellant Berlin Johnson has petitioned the Court to rehear its decision of April 30, 1986, affirming the judgment of the district court.

The court has considered the petition for rehearing offered in support thereof. Finding no issue of law or fact that was overlooked or misapprehended, the petition is found not to be well-taken.

It is therefore, ORDERED that the petition for rehearing is denied.

Entered by Order of the Court
John P. Hehman, Clerk

*Honorable Horace W. Gilmore, United States District Court for the Eastern District of Michigan, sitting by designation.

Rendered March 29, 1985
Civil Action No. 84-213

United States District Court Eastern District of Kentucky Pikeville

BERLIN B. JOHNSON,
Plaintiff

vs.

MEMORANDUM OPINION

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES
Defendant

INTRODUCTION

Berlin B. Johnson, a forty-seven year old man former coal miner filed an application for disability insurance benefits on February 8, 1983,[1] alleging that he became unable to work on June 21, 1977 due to breathing problems and arthritis. (Administrative Transcript (Tr. 69-72). After his application was denied during intitial administrative processing, he was afforded a hearing before an Administrative Law Judge (ALJ), an employee of the Office of Hearings and Appeals ot the Social Security Administration (Tr.21-55). In a written decision issued thereafter, the ALJ recommended that benefits be denied (Tr. 7-12). Since even after receiving additional evidence, the Appeals Council declined to review the matter, the ALJ's opinion stands as the final action of the Secretary. (Tr. 3).

The present action, seeking judicial review pursuant

to provisions of the Social Security Act, was filed in June, 1984. It is currently before the Court on cross-motions for summary judgment.

FACTS

At the hearing, the plaintiff testified concerning his background and physical condition. According to this testimony, the plaintiff was then a forty-nine year old man, who had been born in February of 1935, and had a second grade education. (Tr. 28, 29). He indicated that he could barely read and write and had had no vocational or military training after he left school. (Tr. 29-30). All of his twenty-three years' work experience have involved working underground in the mines; although he had to be switched off of at least one job because of his back, he finally quit work altogether in June, 1977[2] because of his breathing problems. (Tr. 30-31, 32, 44, 46, 48-49). Since he stopped working, he "lays around the house" watching television (Tr. 32, 34); although he attends Church, drives about five miles weekly and can care for his personal needs except for washing his back and head, he has stopped helping his wife with the housework, lets his son take care of the yardwork and gardening, keeps no animals, engages in no hobbies except walking, and sleeps no more than five hours a night (Tr. 28, 32, 33, 34, 35, 41, 47). His lung conditions causes coughing, smothering and chest pain (Tr. 34, 36); he now uses a breathing machine three to four nights a week and takes medicine to help with this condition. (Tr. 36, 37, 45). His arthritis causes his back to hurt, his legs to get numb, and his knees to be stiff and swell; although a back brace has not been recommended, he has had to take medicine for this condition as well. (Tr. 38, 39-40, 50, 53). Although he indicated that his problems were with his arthritis and

lungs, there is some indication that he has a problem grasping objects with his left hand, had suffered a heart attack at work at some point in time, and experiences a decreased appetite, although he was not on a special diet. (Tr. 33-34, 44, 48). He said he felt his conditions had gotten worse since December, 1982 and that, as of the present time, he did not feel that he could stand for more than twenty minutes at a stretch, remain seated for more than forty minutes without moving or walk more than a block without resting (Tr. 35, 37, 51, 52). Moreover, he specifically indicated that not only could he not do a sitting job now, but that he probably could not have performed this type of job back in December, 1982; he is still receiving Worker's Compensation. (Tr. 40, 54).

Besides the hearing testimony, the ALJ also had before him the reports of five different physicians: Dr. Syed Ikramuddin, a surgeon [3] (Tr. 102-105); Dr. E. E. Musgrave, a specialist in Occupational Diseases (Tr. 106-109); Dr. Ira Potter, a family practitioner. (Tr. 110-115); Dr. Bashir Ameji, a family practitioner (Tr. 116-117, 129, 130, 132); Dr. R. Sundaraam, a specialist in Pulmonary Diseases and Internal Medicine (Tr. 118-119).

Dr. Ikramuddin apparently saw the plaintiff on two occasions. In the General Medical Report form completed in July, 1983, the doctor indicated that based on a physical examination alone he found "some evidence" of arthritis of the small joints and, based on wheezing, rhonchi and an expanded chest, sufficient evidence of pneumoconiosis with chronic obstructive pulmonary disease; in his conclusion, Ikramuddin noted that his patient was "totally disabled at this time because of his lung problems." (Tr. 102-105).

The plaintiff was seen again by the same doctor in February of the next year; based on patient history and an exhibition of some stiffness and tenderness of the spine and restriction of movement, the doctor felt that the plaintiff was suffering from arthritic pain. (Tr. 131). Both reports, it should be noted, do not reflect the performance of any laboratory testing.

In a General Medical Report form completed in mid-August, 1983, Dr. Musgrave indicated that he had seen the plaintiff professionally from April, 1977 to the date of the report. (Tr. 106). During a physical examination on the latter date, the doctor noted wheezes, rales and an increased AP diameter of the chest, tenderness and limitation of motion of all large joints, a slow and stiff gait, and marked clubbing of the nail beds. (Tr. 106-107). Laboratory examinations included an electrocardiogram, which showed bradycardia, a chest x-ray, which demonstrated anthrasilicosis,[4] and a large spine x-ray, which revealed osteophyte spurring. (Tr. 109). Based on a diagnosis of anthrasilicosis stage II and osteoarthritis, the doctor indicated that he felt the patient was unfit for manual labor and, therefore, restricted to sedentary activity. (Tr. 109).

On September 12, 1983 Dr. Ira Potter performed a consultative examination at the request of the Social Security Administration. (Tr. 110). During the physical examination, the doctor observed wheezing, a small ventral hernia, Haberdene's nodes in the fingers with some deformity, a twenty percent loss in the range of motion of the lumbar spine with tenderness over L-5, a slight decrease in size of the right calf, a slight depression of the left achilles reflex, and irregular scattered sensory deficit at L-5 der-

matome on the left side. (Tr. 111). An x-ray of the lumbar spine was said to reveal very early degenerative changes; a chest x-ray was interpreted to be normal. (Tr. 112). Although the doctor noted that the pulmonary function study results were compatible with a severe restrictive process and a superimposed moderate expiratory obstruction with a partially reversible airway disease, he indicated that the plaintiff "probably" did not exert maximum effort. (Tr. 112). In his conclusion, Potter stated that the plaintiff was suffering from degenerative joint disease, low back syndrome with some evidence of radiculopathy and x-rays showing degenerative changes, a shortness of breath with pulmonary function sudies indicating severe restrictive lung disease and moderate expiratory obstruction, chronic functional abdominal pain and bilateral visual decrease. (Tr. 112).

In the reports submitted by Dr. Ameji, it is indicated that the plaintiff saw that doctor on a number of occasions from September, 1983 through early 1984.[5] In an undated report issued sometime after October 10, 1983, the doctor indicated that an examination of the plaintiff's chest revealed wheezing and rales in the lungs, a reduced chest expansion, and distant air sounds; the plaintiff's voice was also noted to be hoarse. (Tr. 117); the musculoskeletal examination demonstrated pain in the lumbar sacral area, positive straight leg raising at forty to fifty degrees, and pain on forward flexion (Tr. 117). The doctor's final impression at that time was of chronic obstructive lung disease, secondary to pneumoconiosis, chronic low back pain, secondary to osteoarthritis in the spinous process of the back and chest pain of undetermined etiology; because of these conditions, the patient was advised to refrain from any work in-

volving a dusty atmosphere, squating, bending, lifting, walking on hard surfaces, and standing or sitting for long periods of time - in other words, no gainful employment. (Tr. 117). In cursory, handwritten notes from February, 1984, the doctor reiterated the diagnoses concerning the plaintiff's lungs and back (Tr. 129-130). In a report dictated in mid-March, 1984, the doctor indicated that he had reviewed his previous reports as well as the results of pulmonary function studies and x-rays taken by Dr. Potter and concluded that the plaintiff has chronic obstructive lung disease probably secondary to pneumoconiosis, chronic back pain secondary to L-5 and S-1 disc narrowing, and radiculopathy of the left lower extremity. (Tr. 132). In conclusion, the doctor stated that, inspite of repeated visists and continuing treatment, there was no improvement and the patient was "totally and permanently disabled at the moment." (Tr. 132).

The fifth physician of record, Dr. R. Sundaram, apparently performed no examination on the plaintiff other than pulmonary function study testing done in November, 1983. (Tr. 118-119). According to his notes, the results indicated moderate obstructive airway disease with significant involvement of small airways, which could not be taken as a true value because of poor effort on the part of the patient. (Tr. 118).

Based upon a review of the aforementioned evidence, the ALJ made the following comments:

There is no medical evidence in the record concerning the period from October 20, 1982 through December 31, 1982 from which to determine

whether there was any change in the severity of the claimant's impairments such as would justify the conclusion that his condition had worsened during such time. Dr. . . . Ikramuddin diagnosed ... pneumoconiosis and chronic obstructive pulmonary disease in July 1983 . . . [and stated that the claimant was disabled but] performed no pulmonary function studies. . . Dr. . . Musgrave, in August 1983, diagnosed anthracosis, chronic obstructive airway disease and arthritis and indicated that the claimant was limited to sedentary activity [but] . . . performed no pulmonary function studies. [These] . . . studies were performed by Dr. Ira Potter on September 12, 1983 [but] . . . cooperation was only fair [and] . . . the tracings apparently reveal a minimal effort on the part of the claimant. The studies were repeated by Dr. Raghu Sundaram on November 8, 1983 [but] . . . effort ... was observed to be so poor as to render the results invalid. Dr. Bashir Ameji, on examining the claimant in September 1983, diagnosed chronic obstructive airway disease and chronic low back pain secondary to osteoarthritis [but] . . . offered few objective findings to support the severe limitations set forth in the final paragraph of his report . . .

The claimant at the hearing . . . appeared healthy, well nourished, of seemingly low intelligence and exhibited no physical impairment other than a persistent cough.

There is evidence from which one can concluded that the claimant has some osteoarthritis of the spine and coal worker's pneumoconiosis. However, there are few findings which support the expressed opinions that the conditions are disabling . . .

Most persuasive is the fact that there is not evidence to show that from the time of Judge Napier's decision in October to the expiration of the claimant's insured status in December 1982 his condition had deteriorated to such an extent as to render him disabled.

(Tr. 10-11). At the conclusion of the report, the following findings and conclusions appeared:

The claimant met the disability insured status of the Act during the period under consideration from October 20, 1982 through December 31, 1982.

The claimant has not engaged in substantial gainful activity since June 21, 1977.

The claimant has the following impairment(s): osteoarthritis of the spine and coal worker's pneumoconiosis.

The claimant's allegations of a disabling lung impairment are not supported by the objective medical evidence.

The claimant does not have any impairment or impairments which significantly limit his ability to perform bvasic work-related activities; therefore, the claimant does not have a severe impairment. (20 CFR 404.1521).

The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision.

(Tr. 11-12).

APPLICABLE LAW

In a recent decision, the Sixth Circuit Court of Appeals set out the following seven step test for judicial analysis of Social Security benefit denial cases:

1. Is the claimant currently engaged in substantial gainful activity? If yes, the claimant is not disabled. If no, proceed to Step 2. See 20 C.F.R. §404.1520(b); §20-416.920(b).

2. Does the claimant have any medically determinable physical or mental impairment(s)? If yes, proceed to Step 3. If no, the claimant is not disabled. See 20 C.F.R.§404.1508; 20 C.F.R.§416.908.

3. Does the claimant have any severe impairment(s)-i.e., any impairment(s) significantly limiting the claimant's physical or mental ability to do basic work activities? If yes, proceed to Step 4. If no, the claimant is not disabled. See 20 C.F.R. §§404.1520(c), 404.1521; 20 C.F.R. §§416.920(c), 416.921.

4. Can the claimant's severe impairment(s) be expected to result in death or last for a continuous period of at least 12 months? If yes, proceed to Step 5. If no, the claimant is not disabled. See 20 C.F.R. §404.1509; 20 C.F.R. §416.909.

5. Does the claimant have any impairment or combination of impairments meeting or equalling in severity an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (Listing of Impairments)? If yes, the claimant is disabled. If no, proceed to Step 6. See 20 C.F.R. §§404.1520(d), 404.1526(a); 20 C.F.R.

§§416.920(d), 416.926(a).

6. Can the claimant, despite his impairment(s), considering his residual functional capacity, age education and past work experience, do other work - i. e., any other substantial gainful activity which exists in the national economy? If yes, the calimant is not disabled. See 20 C.F.R. §§404.1505(a), 404.1520(f)(1); 20 C.F.R. §§416.905(a), 416.920(f)(1).

Garner v. Heckler, 745 F. 2d 383, 387 (6th Cir. 1984).

In applying this analysis, it must be remembered that the principles applicable to the judicial review of administrative agency action apply. Judicial review of the Secretary's decision is limited in scope to determining whether the findings of fact made are supported by substantial evidence and in deciding whether the Secretary employed the proper criteria in reaching her conclusion; the findings as to any fact, if supported by substantial evidence, shall be conclusive. Id. This "substantial evidence" is "such evidence as a reasonable mind shall accept as adequate to support a conclusion;" it is based on the record as a whole and must take into account whatever in the record fairly detracts from its weight. Id.

In applying the specific steps of the test in this particular case, additional emphasis on the third stage is in order. This step, as noted previously, involves the issue of the "severe impairment." This term is defined by the regulations to mean an impairment which significantly limits one's ability to perform basic work activities, which is in turn defined as the abilities and aptitudes necessary to do most jobs." 20 C.F.R. §404.1521. Examples of such activities are

physical functions, the use of the special senses, use of judgment, ability to understand and carry out instructions and to respond appropriately to the work environment. 20 C. F. R. 404. 1521.

DISCUSSION

Applying the aforementioned principles to the facts of the present case, it is clear that the decision of the Secretary must be affirmed.

The critical issue in the present case was whether the plaintiff could produce evidence that he was disabled as of the narrow two-month period between the last administrative decision and the expiration of his insured status. This he did not do as to his arthritic and lung conditions - the earliest of the reports submitted in connection with his present application for benefits was months after the expiration period and, further, none of the physicians referred to the earlier time frame.

Accordingly, the Secretary's decision must be affirmed. A separate order consistent with this opinion will be entered this same date.

This the 29th day of March, 1985.

G. Wix Unthank, (sig) Judge

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[1]The plaintiff filed prior applications for disability insurance benefits in June, 1977 and September, 1978; the June, 1978 and October, 1982 denials by ALJ were later affirmed at both the Appeals Council and Federal District Court Level, and are thus, not subject to reopening. The question before the Court at the present time is whether the plaintiff has established disability between the date of the last ALJ decision denying benefits, in October, 1982, and December, 1982, the date the plaintiff's insured status expired.

[2]Although the plaintiff at one point in the testimony indicated that he had last worked in June, 1981, this is presumed to be a misstatement in view of the other evidence of record. (Tr. 30, 44, 95).

[3]The professional qualifications form for "Dr. Ikramuddin" which were included in the administrative record are those of a partner and possible relative; thus, while the partner's practice is that of obstetrics and gynecology, the Dr. Ikramuddin who examined the plaintiff has a practice limited to surgery. (Tr. 121, 131).

[4]Although the handwritten notes are difficult to decipher, it is assumed that the term is anthrasilicosis, which is defined a mixed condition of anthracosis and silicosis. Dorland's Illustrated Medical Dictionary 104 (25th ed. 1974).

[5]The doctor at one point seemed to indicated that he had been treating the plaintiff for "eight years" (Tr. 132). However, from the language of an earlier report, the Court's conclusion is that although the plaintiff has had complaints of shortness of breath for an eight year period, he has only been treated by Dr. Ameji since 1983. (Tr. 116).